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No. 579

In the
Supreme Court of the United States
OCTOBER TERM, 1947

SAM LEE GARLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Sam Lee Garland, respectfully submits his Petition for a Writ of Certiorari to review the decree of the United States Circuit Court of Appeals from the Fifth Circuit in the above entitled cause.

The Circuit Court of Appeals for the Fifth Circuit has affirmed the order of the District Court of the United States for the Northern District of Texas denying petitioner's application to reverse the judgment of the Trial Court and to render judgment in favor of the appellant.

STATEMENT OF THE CASE

On January 31, 1947, the petitioner was tried before the court, without a jury, on charges contained in a criminal information filed in the court, the first six counts of which charge that the petitioner engaged in operation as a broker of transportation by motor vehicle in interstate commerce, for compensation, without having first obtained a license from the Interstate Commerce Commission, authorizing him to engage in such transactions, in violation of Title 49, Sec. (311a), while the seventh count charges that the petitioner engaged in operation as a broker without having filed with, and without there having been approved by the Interstate Commerce Commission, a bond, or other security, as such broker, as required by the regulations of the Interstate Commerce Commission. (49 C. F. R. Cum. Supp. 174.4.)

Petitioner alleged that the Motor Carrier Act provided that before a third party could sell information or arrange transportation for the casual, occasional or reciprocal traveler, that he had to have a broker's license and that after he procured such broker's license he could not sell or arrange transportation for the casual, occasional or reciprocal traveler but only for licensed motor carriers, and for such reason, the broker's license still did not license him to serve the casual, occasional or reciprocal traveler.

At the conclusion of the Government's evidence, the petitioner filed a "Motion for Instructed Verdict" which in

substance questions the authority of the Commission to remove the exemption pertaining to casual, occasional or reciprocal transportation of passengers [Title 49, Sec. 303 (b) (9) U. S. Code], contends that the petitioner's operations as a broker are not subject to regulation by the Commission, and that the order of the Interstate Commerce Commission of March 21, 1942, in Ex Parte MC-35 removing the exemption applicable to casual, occasional and reciprocal transportation of passengers by motor vehicle, for compensation, when such transportatian was sold, offered for sale, or arranged by anyone for compensation, or as a regular occupation or business, was unconstitutional and void. The motion for instructed verdict was overruled by the court.

Upon conclusion of the testimony the court found for the plaintiff with respect to the facts alleged in each of the counts of the information.

The petitioner filed a motion for new trial, setting out all of the points of error, which the court overruled, to which the petitioner excepted and gave notice of appeal to the Circuit Court of Appeals for the Fifth Circuit and said court, after due hearing, affirmed the judgment of the lower court and petitioner then filed a Motion for Rehearing in due time, which was overruled on January 7, 1948, from which this petitioner files this Application for Writ of Certiorari to this Honorable Court.

OPINION BELOW

The opinion of the Circuit Court is reported, 164 F. (2d) 487. The opinion of the trial court is contained. (R. 148-151.)

STATEMENT OF JURISDICTION

This court is authorized by Section 240 of the Judicial Code, as amended (36 Stat. 1157, 43 Stat. 938; 28 U. S. C. A. Sec. 347) to review on certiorari the judgment of the Circuit Court. That statute reads in part as follows:

> "In any case, civil or criminal, in a Circuit Court of Appeals, * * * it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court, that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal [28 U. S. C. A., Sec. 347(a)]."

The judgment of the Circuit Court was rendered on December 4, 1947. A timely motion for rehearing was denied by that court on January 8, 1947, and this petition for review on writ of certiorari will be filed "within three months" thereafter, as required by Section 8 of the Act approved February 13, 1925 (43 Stat. 940; 28 U. S. C. A. Sec. 350) as construed by this court in *Gypsy Oil Company v. Leo Bennett Escoe, a Minor, by O. W. Stephens Guardian, 275 U. S. 498-499*, and *Department of Banking of Nebraska, Receiver v. Pink, Superintendent of Insurance of the State of New York, 317 U. S. 264, 266.*

Petitioner adopts the foregoing summary statement of the case on pages 2-3 as a part of this jurisdictional statement.

QUESTIONS PRESENTED

The questions on which a review is sought, by the record in this case are as follows:

ASSIGNMENTS OF ERROR

The errors relied on for reversal were filed in the trial court and the Circuit Court of Appeals in connection with our petition for appeal in those courts, and are included in our petition for appeal to the Supreme Court of the United States, and are as follows:

1. The trial court and the Circuit Court of Appeals erred in overruling petitioner's Motion for Instructed Verdict for the reason that the Government had wholly failed to make a case against this petitioner in that the evidence did not warrant or justify said courts to find the petitioner guilty.

2. The trial court and Circuit Court of Appeals erred in finding the petitioner guilty of the seven counts charged in the information for the reason that the rules which petitioner is charged with violating do not apply to this petitioner, and if made or interpreted to apply against this petitioner, is wholly unreasonable, unjustifiable, unconstitutional and ambiguous.

3. The trial court and Circuit Court of Appeals erred in permitting into evidence pictures of petitioner's place of business, said pictures taken on July 10, 1946, and introduced in evidence for the purpose of showing that the petitioner solicited the business in violation and contrary to Interstate Commerce Act and that said pictures shown

were taken out of date, not charged in the information, and being months later than the dates made in the charges and counts of information and the courts' permitting the introduction of these exhibits over the objection of the petitioner and the same constitutes a reversible error.

4. The trial court and Circuit Court of Appeals erred in finding the petitioner guilty of Count No. 7 because the evidence was conclusive that the bond required under the act was impossible of procurement and was a type of bond which insurance companies would not write for the reason that petitioner does not sell, control, or operate the motor vehicle and is wholly a seller of information and having no control over the destiny of said motor vehicle and having no interest in the motor vehicle is not coverable by insurance or bond as required by Section 204(a)(4) and Section 211(a)(c), Interstate Commerce Act and the evidence is uncontradicted that such bond is not available, that it is impossible of procurement and, therefore, the courts erred in finding the petitioner guilty of violating a law because of impossibility of performance.

5. The trial court and Circuit Court of Appeals erred in finding the petitioner guilty of Counts Nos. 1 to 6, inclusive, of the informations for the purported violation of Sec. 211(a) of said act, Title 49, Sec. 311(a), of the U. S. Code, for the reason that the only evidence submitted by the Government was students at the University of S.M.U., who contended that they were employed by the Better Business Bureau and solicited by the P[illegible]ssor at the University to pretend that they desired [illegible]rtation to various points of the United States and e[illegible] witness testi-

fied that the service was not given, that had it been offered he would not have accepted, that he did not intend to take such trip, that he was merely playing detective and trying to procure the type of information that the Better Business Bureau was trying to procure to file charges against the petitioner and same constitutes an entrapment; that the evidence is not conclusive to show a bona fide offer or a bona fide contract or a bona fide solicitation or a bona fide arrangement of the kind and character so as to warrant that said courts find this petitioner did arrange for and procure the transportation for the evidence is uncontradicted that the transportation was not arranged and, therefore, said courts erred in finding this petitioner guilty.

6. The trial court and Circuit Court of Appeals erred in holding the appellant guilty of the counts charged in the information for the reason that the Government by stipulation admitted that if the petitioner made application to the Interstate Commerce Commission for the procurement of a broker's license, and had he received such license that he still would not have been entitled to operate the same or similar business which he was now operating and that he could only arrange transportation for licensed common carriers whereas the petitioner was selling information to occasional, casual and reciprocal travelers.

7. The trial court and Circuit Court of Appeals further erred in holding the petitioner guilty of an act which is in complete violation of the 5th and 14th Amendments to the Constitution of the United States and that said act is unconstitutional.

8. The trial court and Circuit Court of Appeals erred in holding against the petitioner for the reason that the petitioner had not violated any law in view of the stipulations agreed upon between the attorney for the Government and the attorney for the petitioner.

9. The trial court and Circuit Court of Appeals erred in finding petitioner guilty because the business of petitioner is a private one; he sells only information whereby a private citizen may make a contract or agreement with another; he has nothing to do with the terms of such contract. When a contract is made between the parties whom petitioner has introduced by means of his information bureau, he is paid and his negotiations are at an end.

10. The trial court and Circuit Court of Appeals erred in finding the petitioner guilty because the Act does not accomplish the purpose for which it was intended.

11. The trial court and Circuit Court of Appeals erred in finding petitioner guilty because the facts of this case show that petitioner is engaged in a private business, making private contracts and is not subject to regulation by the Interstate Commerce Commission under the guise of its authority to regulate transporation.

12. The trial court and Circuit Court of Appeals erred in finding petitioner guilty because Congress, who has the exclusive power to regulate interstate commerce, has exempted the occasional, casual and reciprocal transportation and since the regulations passed upon petitioner by the Interstate Commerce Commission are such that the petitioner cannot obey such regulations and at the same time

operate the same and similar business in which he is engaged, and the rules and regulations of the Interstate Commerce Commission is, therefore, impossible of performance.

13. The trial court and Circuit Court of Appeals erred in finding petitioner guilty because under the facts of this case, there is no necessity to place the term "BROKER" upon petitioner and the Interstate Commerce Commission has no authority to regulate petitioner's business. Most of the petitioner's business is getting people together who are traveling from one state to another.

14. The trial court and Circuit Court of Appeals erred in finding petitioner guilty because the Interstate Commerce Commission rules provide that petitioner shall furnish bond with solvent sureties, conditioned that the applicant will faithfully perform all the duties and undertakings of a transportation agent, and the facts of this case show that no bonding company or solvent sureties will make the bond imposed by the act, and, therefore, petitioner cannot comply with its provisions.

15. The trial court and Circuit Court of Appeals erred in finding petitioner guilty because the act under which he is charged with violation is unconstitutional in that it violates the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States.

16. The trial court and Circuit Court of Appeals erred in finding petitioner guilty for the reason that the evidence was uncontradicted that even if the petitioner had made application to the Interstate Commerce Commission

for a broker's license, and even if such broker's license were granted, that the license provided for by the Interstate Commerce Commission is not one which will permit petitioner to engage in the same kind and character of business in which he is now engaged, nor would it permit him to engage in interstate business doing the same business acting as a broker between persons who are engaged in casual, occasional and reciprocal transportation.

17. The trial court and Circuit Court of Appeals erred in finding petitioner guilty because the Act violates the 5th Amendment to the Constitution of the United States in that it deprives the petitioner of his property without due process of law.

18. The trial court and Circuit Court of Appeals erred in finding petitioner guilty for the reason that the Congress has no power under the Constitution to delegate its powers, and since the removal and changing of Sec. 210 of the Motor Carrier Act was done by the Interstate Commerce Commission and not by Congress itself, it, therefore, violates the provision of the Constitution.

19. The trial court and Circuit Court of Appeals erred in finding petitioner guilty for the reason that under Section 303(b)(9) VEHICLES EXCEPTED FROM OPERATION OF LAW, the casual, occasional or reciprocal transportation is excluded and, therefore, petitioner is not within the terms and definitions of a broker, nor is he subject to regulations applying to a broker.

20. The trial court and Circuit Court of Appeals erred in finding the petitioner guilty for the reason that the busi-

ness in which he is engaged is a lawful business and is neither in fact nor threat an infringement or trespass upon the health, safety, comfort or welfare of the public.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Petitioners respectfully submit that this application for a writ of certiorari should be granted for each of the following reasons:

1. To give full force and effect to the existing appellate authority of the Supreme Court of the United States in the furtherance of justice.

2. The judgment of the Circuit Court of Appeals, which involves questions of local law, is in conflict with decisions of the Supreme Court of the State of Texas and the Court of Criminal Appeals of Texas (The Highest Criminal Court in this State) in the cases of *Ex Parte Martin, 127 Tex. Cr. A. 25; 74 S. W. (2d) 1017; Ex Parte Talkington, 104 S. W. (2d) 495, 496, 498, Karr v. State, 54 S. W. (2d) 94, Tex. Cr. App.*

3. The Circuit Court on opinion misinterpreted and misapplied the decision of this court in *Martin v. U. S., 100 F. (2d) 490*, and the opinion and judgment of the Circuit Court are in conflict with such decision.

4. The Circuit Court on opinion misinterpreted and misapplied Art. 1, Sec. 8, Ch. 3—Subd. 18, the 5th and 14th Amendments to the Constitution of the United States.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the judgment herein of the said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as to this court may seem proper.

Respectfully submitted,

HENRY KLEPAK,
Counsel for Petitioner.

No.....

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SAM LEE GARLAND,

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v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

As permitted by Rule 38, petitioner attaches this supporting brief to his petition for writ of certiorari.

GROUNDS OF JURISDICTION

Petitioner adopts, as his grounds of jurisdiction, the jurisdictional statement on page 4, of the foregoing petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner adopts, as his statement of the case, the Summary Statement of the Case, pages 2-3, inclusive, and Statement of Jurisdiction, page 4, of the foregoing petition for a writ of certiorari.

SPECIFICATION OF ASSIGNED ERRORS

The record in this case and the Assignments of Error give rise to and support the following points or propositions:

1. Where petitioner was engaged in the useful and lawful occupation of selling information to private citizens, the conduct of which business was neither in fact nor threat an infringement or trespass upon the health, safety, comfort or welfare of the public, such business is not subject to regulation by the Interstate Commerce Commission.

2. The Government may not in the guise of protection of the public, arbitrarily interfere with private business, or prevent lawful occupation, or impose unreasonable and unnecessary restrictions upon them.

3. Where a rule or regulation prohibits this man or any other from engaging in a like occupation upon the same terms and conditions because of requirements unreasonable, impossible of performance without fair application, and prohibitive and surrounds his attempts to engage in this business with conditions precedent and concomitant such as reveal themselves in the rules and regulations of Interstate Commerce Commission, such rules and regulations are unconstitutional and unenforceable.

4. Interstate Commerce Commission's attempts to regulate petitioner's business is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Since Congress has no authority under the Constitution to delegate its powers, the Interstate Commerce Commission was without authority to promulgate rules and regulations for petitioner's business.

6. The trial court and Circuit Court of Appeals erred in permitting into evidence pictures of petitioner's business which were taken after the alleged violation without testimony that the same conditions as reflected by the pictures existed at the time of the alleged violation.

7. Where stipulation of facts were agreed upon between the attorney for the petitioner and the attorney for the Government to the effect that even if petitioner possessed a broker's license that petitioner still could not engage in the same or similar business that he was operating but would be compelled to arrange transportation for licensed motor carriers and not for casual, occasional and reciprocal travelers, such requirement is unconstitutional, unreasonable and is an attempt to regulate petitioner out of a lawful business.

8. Where evidence is undisputed, and a reasonable inference can be drawn that the type of bond required of petitioner was impossible of procurement, the trial court and the Circuit Court of Appeals erred in holding petitioner guilty for failure to file such bond with the Interstate Commerce Commission.

9. Where evidence of Government depended wholly upon testimony of paid college students who admitted they were not seeking a bona fide transportation and would not have accepted such transportation if available but were seeking

evidence upon instructions of the Better Business Bureau, and one witness who constantly contradicted his own testimony, the courts erred in placing any reliance or credence in such testimony.

DISCUSSION OF POINT NO. 1

Where petitioner was engaged in the useful and lawful occupation of selling information to private citizens, the conduct of which business was neither in fact nor threat an infringement or trespass upon the health, safety, comfort or welfare of the public, such business is not subject to regulation by the Interstate Commerce Commission.

The business of petitioner is a private one; he sells only information whereby a private citizen may make a contract or agreement with another; he has nothing to do with the terms of such contract. When a contract is made between the parties whom petitioner has introduced by means of his information bureau, he is paid and his negotiations are at an end.

There is no more reason for petitioner to post a bond than for a grocer, a tailor, or a wood chopper to post such bond before he enters into a private contract of employment.

Petitioner's business is not subject to regulation under the police power as was held by Judge Lattimore in *Ex Parte Martin under Syl. 5* thereof:

> "Without attempting a definition of police power, further than to quote from our Supreme Court in

Spann v. City of Dallas, 111 Texas 350, 235 S. W. 513, 515, 19 A. L. R. 1387, wherein it is said: 'The police power is a grant of authority from the people to their government agents for the protection of the health, the safety, the comfort and the welfare of the public,' we observe that, as far as we can tell from the record before us, this defendant was engaged in the useful and lawful occupation of selling information to private citizens, the conduct of which business was neither in fact or threat an infringement or trespass upon the health, safety, comfort, or welfare of the public. He drove no cars on the public roads or bridges as a business. He made no contracts controlling the share-expense trips of his customers. He sold information by means of which the purchaser thereof was related to the seller only so far as pertained to the route expected to be taken by each or both. He gave no guarantee as to the good or bad character of the parties thus put in touch with each other, or as to the kind or quality of their vehicles."

Also, in the case of *Ex Parte Talkington, 104 S. W. (2d) 495*, we find that the facts exhibited there are the same facts as are presented here by the petitioner, and quoting from Judge Lattimore's opinion, in the first paragraph of page 496 thereof, he says:

"The statement of facts herein shows that appellant conducted what is generally known as a travel bureau in Fort Worth, Texas, at the Metropolitan Hotel in said city. Here he kept two registers. In one, persons registered their names and addresses who desired to share the expense of travel with some person owning an automobile and going to the point to which the registrant desired to go. In the other, persons registered as going by automobile to points within and without the State of Texas, who would like to have some person accompany them and pay part of the necessary expenses of the trip. Further it is shown by the record

that if appellant brought two persons together whose names appeared on the respective registers mentioned, and these parties agreed with each other upon the division of the expenses of the trip under consideration, the party who rode in the car of the other paid to appellant one dollar as compensation for his said service.

"Appellant collected nothing from the car owner, had nothing to do with the share-expense agreement, got no part of the cost of same, made no representations, and gave no guarantees in regard to cars, or the conduct of the trip, acting solely as an information bureau or person who collected from one of said parties the fee above set out in case his information brought such parties together, and they made a satisfactory agreement between themselves."

The statement of facts in this, the petitioner's case, show:

"That appellant operates a travel bureau in Dallas, Texas. That he keeps two registers. In one of these is registered the names and addresses of persons who desire to share the expense of travel with some person owning an automobile and going to a point which the registrant desires to go. In the other register are persons' names who are going by automobile to points within and without the State of Texas, and who would like to have someone accompany them and share a part of the necessary expenses. Appellant's business is that of bringing the two persons together, and if these parties agree with each other upon the division of the expenses of the trip under consideration, the appellant is paid a flat fee as his compensation for his services in introducing the parties to each other. Appellant collects nothing from the car owner and has nothing to do with the share-expense agreement; he makes no representations and gives no guarantees in regard to the course or the conduct of the trip but allows the two parties to make their own contract and to agree upon such terms as they may desire. In the event the parties do not

agree upon a consideration or the route that they are to take, or in other words, if they do not travel with each other appellant is paid nothing for his services in introducing the parties, but if they do make an agreement between themselves, then appellant is paid a small fee for his services."

We respectfully submit that the facts in the petitioner's case and the facts in *Ex Parte Talkington* are the same and that Judge Lattimore found that there was no difference in the facts in the *Talkington case* and those exhibited in *Ex Parte Martin*. Judge Lattimore, in the *Talkington case, on page 496, fourth paragraph*, said:

"This court finds no substantial difference in the facts here exhibited and those brought before us in Ex Parte Martin, 127 Tex. Cr. R. 25; 74 S. W. (2d) 1017."

Now with the facts of the "*Martin case*," and the facts of the "*Talkington case*," and the facts as exhibited here by the petitioner, we quote again from Judge Lattimore in his opinion in *Ex Parte Talkington, 104 S. W. (2d) 498, third paragraph* thereof:

"Bearing in mind what we have above set out from the statement of facts showing the business of appellant to be confined to selling information, and that he does not sell or negotiate transportation, nor does he own nor operate any motor vehicle over any highway in this state or elsewhere, and does not dictate or suggest the terms or conditions upon which the purchasers from him of information shall contract with each other, or whether they go by dirt road or paved, or what route they take, this law seems clearly in violation of the Fourteenth Amendment to our Federal Constitution, and of Section 19 of our Bill of Rights, in that it prohibits this man or any other engaging in a like occupation, upon the same terms and conditions,

(1) because of requirements unreasonable, (2) impossible of performance, without fair application, and prohibitive, and surrounds his attempt to engage in this business with conditions precedent and concomitant such as reveal themselves to a casual reader of those parts of the statute which we have above quoted as being of the kind and character we have just stated."

The late Judge Lattimore, in his opinions in the "*Martin case*" and the "*Talkington case*," was not without a parallel opinion although few cases are cited by the learned judge in said opinions. We find comparative decisions have been made in both our Courts of Civil Appeals and in the Supreme Court.

But since the court held in *Ex Parte Martin, supra,* that the appellant's business was not a public one and not subject to the police powers, the Interstate Commerce Commission has no right to interfere with appellant's business.

DISCUSSION OF POINT NO. 2

The Government may not in the guise of protection of the public, arbitrarily interfere with private business, or prevent lawful occupation, or impose unreasonable and unnecessary restrictions upon them.

The Act does not accomplish the purpose for which it was intended. There is no necessity for placing such burden on petitioner, unless the petitioner is held liable for what happens after the prospective rider and carrier have ended their negotiations with him and are on their journey. This seems to have been the intention and purpose of the exemption of Congress when the Motor Carrier Act was

passed—and a court in passing upon the constitutionality of the rules of the Interstate Commerce Commission should examine such rules and determine whether the same tends to accomplish the purpose for which they were intended, as has been said by the Supreme Court of the United States in *Jay Burns Baking Co. v. Chas. W. Bryan, 264 U. S. 503:*

> "The court must, when constitutional protection from state legislation—is invoked, determine whether or not the challenged provision has reasonable relation to the protection—and really tends to accomplish the purpose for which it was intended."

The facts of this case show that petitioner owns no cars, sells no transportation and, therefore, could have nothing to do with passengers being stranded or whether same occurs far away or close to home and friends; petitioner has nothing to do with the passenger after the journey is begun and if additional charges are made, it becomes a matter between passenger and the carrier and has nothing to do with petitioner; the passenger and the carrier may go over any route they take or whether they go by dirt road or paved road; whether there has been developed a class of irresponsible persons who operate automobiles from place to place and whether they have insurance or whether they are able to respond in damages has nothing to do with petitioner's business.

The Interstate Commerce Commission has no authority to place such unreasonable and unnecessary burdens upon petitioner.

Again we quote from the *Jay Burns case, supra, Syl. 1,* by the Supreme Court of the United States:

> "A state may not, in the guise of protection of the public, arbitrarily interfere with private business, or prevent lawful occupation, or impose unreasonable and unnecessary restrictions upon them."

One does not devote his property or business to the public use simply by making a commodity or selling information as has been held by the Supreme Court of the United States in *Chas. Wolff Packing Co. v. Court of Industrial Relations, supra, p. 537 (of 262 U. S.), 43 S. Ct. 630, 633 (67 L. Ed. 1103, 1109, 27 A. L. R. 1280)* [Also cited in *Karr v. State, 54 S. W. (2d) 94, Tex. Cr. App.*] it is said:

> "It has never been supposed, since the adoption of the constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator, or the miner was clothed with such public interest that the price of his product or his wages could be fixed by state regulation.—One does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common calling of which those above mentioned are instances."

The facts of this case show that petitioner is engaged in a private business, making private contracts and is not subject to regulation by the Interstate Commerce Commission under the guise of its authority to regulate transportation. The facts presented before this court are the same as the facts in *Ex Parte Martin, supra, 74 S. W. (2d) 1017,* wherein the court said:

> " 'The police power is a grant of authority from the people of their government agents for the protection of the health, the safety, the comfort and the welfare of

> the public;' we observe that, as far as we can tell from the record before us, this defendant was engaged in the useful and lawful occupation of selling information to private citizens, the conduct of which business was neither in fact nor threat an infringement or trespass upon the health, safety, comfort or welfare of the public."

We respectfully submit, therefore, that the regulation of the Interstate Commerce Commission is unreasonable, unnecessary and is an attempt of that bureau to interfere with private business and is, therefore, unconstitutional, and the rules and regulations relative to the broker's license do not accomplish the purpose for which it was intended if applied to the brokers engaged in the casual, reciprocal and occasional transportation.

The business in which petitioner is engaged is a lawful business and the facts presented before this court are the same facts presented in *Ex Parte Martin, 74 S. W. (2d) 1017.*

The court has declared the law in *Ex Parte Martin, 74 S. W. (2d) 1017*, that:

> "In all such cases, the courts must determine whether there be reasonable necessity for such enactment, and the reasonableness of the enactment; Repdogle v. City of Little Rock, 116 Ark. 617, 267 S. S. 353, 36 A. L. R. 1333; Town of Windson v. Whitney, 95 Conn. 357, 111 A. 354, 12 A. L. R. 669.
>
> "We confess that other parts of said act appear to be unreasonable and indefinite."

DISCUSSION OF POINT NO. 3

Where a rule or regulation prohibits this man or any other from engaging in a like occupation upon the same

terms and conditions because of requirements unreasonable, impossible of performance without fair application, and prohibitive and surrounds his attempts to engage in this business with conditions precedent and concomitant such as reveal themselves in the rules and regulations of Interstate Commerce Commission, such rules and regulations are unconstitutional and unenforceable.

Under Section 303:

> "(18) The term 'broker' means any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale *any transportation subject to this chapter*, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation."

The court will note that the term "broker" applies only to those who sell or offer for sale any transportation subject to this chapter.

Under Section 303(b)(9) VEHICLES EXCEPTED FROM OPERATION OF LAW, the casual, occasional or reciprocal transportation is excluded and, therefore petitioner is not within the terms and definitions of a broker, nor is he subject to regulations applying to a broker.

That under Section 311(a), styled MOTOR TRANSPORTATION BROKERS (a) LICENSE REQUIRED: it provides that no such person shall engage in transportation subject to this chapter and that petitioner is not subject to this chapter for it has been clearly shown that the petitioner arranges for the meeting of people who are not sub-

ject to the chapter of the Motor Transportation Act and that the petitioner does not arrange for transportation subject to the Motor Transportation Act and that the regulations passed by the Interstate Commerce Commission are such that would, by necessity, force the petitioner to arrange for transportation only with bona fide licensed motor carriers.

That Which a Casual Driver May Do for Himself He May Employ an Agent to do for Him

It is a fundamental principle of the law of agency that what a person may lawfully do himself, he may employ another to do for him. Thus in *2 Am. Jur., p. 15, Sec. 3,* it is said:

> "The fundamental idea of agency has its conception in something lawful that a person may do and a delegation by such person to another of the power lawfully to do that thing. It is accordingly a consequence of the relation that whatever an agent does in the lawful prosecution of the business intrusted to him is the act of the principal."

A principal is defined as:

> "The person for whom another acts and from whom he receives authority to act. The agent is the substitute or representative of his principal, who acts for and represents the principal, and who derives his authority from him." *2 Am. Jur., p. 13, Sec. 2.* See, also: *2 C. J. S. 1024, Sec. 1b, 1c.*

We know of no rule of law which justifies or sustains the imposition of a license requirement before one, who may himself lawfully do an act under a statute without such license, must procure such license if he utilizes an

agent to bring him into contact with the share expense passenger.

The purpose of M. C. 35 is that a true casual operator may, himself solicit or through the medium of a gratuitous third person, not engaged in such business, solicit such passengers and transport them without in any manner violating the Motor Carrier Act. Such casual driver is free from complying with any of the requirements of the Act. The same casual driver, however, becomes subject to and incurs all of the penalties of the Act, including prosecution for a criminal offense, if he carries share expense passengers who have been procured for him by an agent. Thus by employing another person to act as his agent and paying such other person a compensation to perform an act which he, as a casual driver, may himself legally perform, he is penalized. Thus he is deprived of the use of an agent of his own choosing. This, it would appear, is contrary to all of the fundamental principles of the law of principal and agent and violates the guaranty of the Fifth Amendment to the Constitution of the United States in that it deprives the principal of his agent, and the petitioners the right to act as such agent.

As was said in *U. S. v. Murphy (D. C. Ala. 1931), 50 Fed. (2d) 455, at page 457:*

> "Taking the construction of the act by Justice Washington as being correct, and I agree with him in his construction, the act declares no penalty against the owner of the vessel unless he has the intention to prejudice a person that may underwrite a policy of insurance thereon, or any other owner of such vessel. For, as Justice Washington says, the owner might de-

stroy his own property himself or cause it to be done without committing any offense against this or any other law.

"If, therefore, the owner may cast away his vessel, or may direct it to be done without committing an offense, how can an indictment make it an offense for the owner to direct another person to cast away such vessel unless the indictment contains the essentials found in the statute? If the doing of the act by the owner is not an offense against the law, how can an agreement between the owner and another person that the other should do the act for the owner constitute a criminal conspiracy?

* * * * *

"It is urged that one may be guilty of a conspiracy where he agrees that another should do an act which he himself could not do. That may be true, but I do not think it possible that a man could be guilty of a conspiracy where he directs another to do an act which he himself might legally do. How could he offend a statute if he has the right to do an act condemned by it?"

DISCUSSION OF POINT NO. 4

Interstate Commerce Commission's attempts to regulate petitioner's business is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The act under which petitioner is charged with violation is unconstitutional in that it violates the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States.

Section 203 of the Motor Carrier Act of 1935, amended June 23, 1938, provides:

"Nothing in this chapter * * * shall be construed to include * * * 7(a) the transportation of persons or

property by motor vehicle when incidental to transportation by aircraft nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in the Interstate Commerce Act, shall the provisions of this chapter apply to: (9) the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this chapter or under a pending application for such certificate or permit.

"(18) The term 'broker' means any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this chapter, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation." *U. S. C. A. 49, Sec. 303.*

That as a result of a certain application and hearings, the following order was issued at a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 1st day of May, A. D. 1940, in *case Ex Parte No. MC-35, Exemption of Casual, Occasional or Reciprocal Transportation of Passengers by Motor Vehicle:*

"Section 203 (b) of the Motor Carrier Act, 1935, and the petition of National Bus Association for removal

of exemption of casual and occasional transportation of passengers from the provisions of the Motor Carrier Act, 1935, being under consideration; and good cause therefor appearing;

"*It is ordered*, that an investigation be, and it is hereby, instituted into practices with respect to the casual, occasional, or reciprocal transportation of passengers in interstate or foreign commerce for compensation for the purpose of determining whether the exemption of such transportation as provided in Section 203(b) (9) of said Act, should be removed to the extent necessary to make applicable all provisions of said Act to such transportation when it is sold, or offered for sale, or provided, or procured, or furnished, or arranged for, by a person who holds himself or itself out as one who sells, or offers for sale transportation wholly or partially subject to said Act, or who negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for, such transportation."

That at a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 21st day of March, A. D. 1942, in the case of *Ex Parte No. MC-35, Exemption of Casual, Occasional, or Reciprocal Transportation of Passengers by Motor Vehicle:*

"*It appearing*, that by order of May 1, 1940, the Commission, Division 5, entered into an investigation into practices with respect to the casual, occasional, or reciprocal transportation of passengers in interstate or foreign commerce for compensation for the purpose of determining whether the exemption of such transportation as provided in Section 203(b) (9) of the act should be removed to the extent necessary to make applicable all provisions of the act to such transportation when it is sold, or offered for sale, or provided, or procured, or furnished, or arranged for by any person who holds himself or itself out as one who sells, or offers

for sale transportation wholly or partially subject to the act, or who negotiates for, or holds himself out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for, such transportation;

"*And it further appearing*, that a full investigation of the matters and things involved has been made and that the division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

"*It is ordered*, that the Code of Federal Regulations be, and it is hereby, amended by adding the following:

"Title 49—Transportation and Railroads.

"Chapter 1—Interstate Commerce Commission.

"Subchapter B—Carriers by Motor Vehicle.

"Part 210—Exemptions.

"Section 210. 1. *Casual, occasional, or reciprocal transportation of passengers for compensation when such transportation is sold or arranged by anyone for compensation.* The partial exemption from regulation under the provisions of Part II of the Interstate Commerce Act of the casual, occasional, and reciprocal transportation of passengers by motor vehicle in interstate or foreign commerce for compensation as provided in Section 203(b)(9) of the act be, and it is hereby, removed to the extent necessary to make applicable all provisions of Part II of the act to such transportation when sold or offered for sale, or provided or procured or furnished or arranged for, by any person who sells, offers for sale, provides, furnishes, contracts, or arranges for such transportation for compensation or as a regular occupation or business. [Sec. 203(b)(9), 49 Stat. 546, 54 Stat. 919, 921; 49 U. S. C. 303(b)(9).]

"*It is further ordered*, that this order shall become effective May 15, 1942.

"*And it is further ordered*, that notice of this order be given to the general public affected thereby by publishing it in the Federal Register and by depositing copies thereof in the office of the Secretary of the Commission in Washington, D. C,

"By the Commission, Division 5."

It is the contention of the petitioner that such regulation violated the Fifth Amendment to the Constitution of the United States and also the Fourteenth Amendment to the Constitution of the United States, as well as Article I, Sec. 1, of the Constitution of the United States itself, and Section 303(b)(9). That Congress did not delegate the authority to the Interstate Commerce Commission to amend, change, alter the statutes in said Motor Carrier Act and Congress did specifically, under Section 303(b)(9), exclude from the operation of law, the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for by a broker or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this chapter or under a pending application for such a certificate or permit.

The Constitution of the United States gave to Congress certain rights and among them was the right to regulate

transportation and commerce between the states and that Congress, pursuant to such authority, did pass what is known as the Interstate Commerce Act, and by said acts, which are known as our Federal Statutes, created the Interstate Commerce Commission and did specifically delegate such authority and rights to said Interstate Commerce Commission as set forth under the Interstate Commerce Act and that Congress did by enactment, exclude certain operations from said law and among those excluded by statute was that of the casual, occasional and reciprocal transportation of said property, and your petitioner would show that a rule promulgated by the Interstate Commerce Commission, known as Section 210-1, is unlawful authority and that no bureau may legislate but may make regulations and said Act does not constitute regulation but legislation in that it is contrary to the powers delegated to the Interstate Commerce Commission by Congress and is an attempt by the Interstate Commerce Commission to invalidate an act of Congress.

Order M. C. 35 Violates the Fifth Amendment to the Constitution of the United States in that it Deprives the Petitioners of their Property Without Due Process of Law

The power of Congress to regulate commerce between the states is subject to all of the limitations imposed by the Fifth Amendment to the Constitution.

Monongahela Nav. Co. v. U. S., 148 U. S. 312;
U. S. v. Chicago, Milwaukee R. R., 282 U. S. 311;
Tagg Bros. & Moorhead v. U. S., 280 U. S. 420.

Thus, in the *Chicago, Milwaukee case, supra*, the court, at page 327, said:

> "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation, and that no person shall be deprived of life, liberty or property without due process of law."

The Fifth Amendment, as applied to the right of Congress to regulate interstate commerce, carries with it all of the prohibitions of the Fourteenth Amendment, and is, in fact, co-extensive with it.

French v. Barber Asphalt Paving Co., 181 U. S. 324;
Twining v. New Jersey, 211 U. S. 78;
Heiner v. Donnan, 285 U. S. 312.

Therefore, neither a state nor Congress can, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable restrictions upon them.

Smith v. Texas, 233 U. S. 630;
Burns Baking Co. v. Bryan, 264 U. S. 504;
Weaver v. Palmer Bros. Co., 270 U. S. 402;
Liggett Co. v. Baldridge, 278 U. S. 105.

It follows, therefore, that if an administrative or quasi-judicial board has the power to grant or withhold permission to carry on a business or occupation lawful in itself, and such power is arbitrarily exercised, the courts will not hesitate to interfere for the protection of the one so injured.

N. Y. ex rel Lieberman v. Van de Carr, 199 U. S. 552;
Gundling v. Chicago, 177 U. S. 183.

The Interstate Commerce Commission has repeatedly held that it has no jurisdiction whatever over travel bureaus.

MacDonald & Wright, Broker Application, No. MC 12, 107, July 15, 1939;
J. Elliott Frank, Broker Application, No. MC 15, 860, June 14, 1938.

Regarding the application of *MacDonald & Wright, supra*, the Interstate Commerce Commission in denying the same, said:

> "If applicants confine their services to arranging for the casual or occasional transportation of passengers by persons not engaged in transportation by motor vehicle as a regular occupation or business within the meaning of Section 203 (b) (9) of the Motor Carrier Act, 1935, such services would not be subject to the Act and the Commission has no alternative but to deny an application for such services. However, if applicants should at some future time desire to arrange for the transportation of passengers by persons or carriers other than those falling within the exemption heretofore referred to, it would be necessary to secure a license from the Commission before engaging in such operations."

Likewise, in denying the application for a broker's license in the *Frank case, supra*, the Commission said:

> "However, this practice of arranging for the transportation of passengers in interstate commerce in vehicles owned by private individuals is not subject to the Act for the reason that the brokerage provisions of the Act apply only to transportations subject to the Act and under Section 203 (b) (9) 'the casual, occasional, or reciprocal transportation of passengers or property in interstate commerce for compensation by any per-

son not engaged in transportation by motor vehicle as a regular occupation or business' is exempt from the provisions of the Act."

However, a travel bureau operator who knowingly arranges for transportation in a motor vehicle owned or operated by a "regular driver" is subject to prosecution for conspiracy to violate the Motor Carrier Act of 1935, and is therefore subject to the penal provisions of said Act. Likewise, a "regular driver," who is defined as a person who engages in the transportation of persons or property as a regular occupation or business without license from the Commission, is subject to the jurisdiction of the Interstate Commerce Commission and may be prosecuted for his violation of the said Act.

Martin v. U. S., 100 Fed. (2d) 490 (C. C. A. 10).

Thus, the conclusion is inescapable that the Motor Carrier Act contains adequate provisions to protect the public against the practices condemned by the Commission in its report MC 35, to-wit, the employment of regular drivers, which practices are the basis upon which the Commission has removed the exemption contained in Section 203(b)(9) with regard to casual drivers. It is apparent, then, that the removal of said exemption confers upon the Commission no greater power or jurisdiction over regular drivers than it already had.

Nevertheless, MC 35 undertakes to put out of business the travel bureau operator who deals solely with casual drivers and who is not in any way violating the law. The Commission concedes in its report that the travel bureau

business is a lawful business and may be conducted with propriety and with resultant benefit to the public. Merely because some travel bureau operators have conspired with regular drivers to violate the Act and thereby commit a crime it does not follow that duly licensed and regulated travel bureaus, lawfully conducted, should be deprived of their businesses.

As stated by the Supreme Court in *Smith v. Texas, 233 U. S. 630, 636, 58 L. Ed. 1128:*

> "In so far as a man is deprived of his right to labor, his liberty is restricted, his capacity to earn wages and *acquire property is lessened*, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

In *Chas. Wolff Packing Co. v. Court of Industrial Relations, p. 536 (67 L. Ed. 1109, 27 A. L. R. 1280, 43 Sup. Ct. Rep. 630)*, it was said:

> "To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation but not for price fixing, as we have already definitely decided. Tyson & Bro.-United Theatre Ticket Offices v. Banton, supra, 442-445."

It is apparent from a fair reading of the report in MC 35 that the order is directed solely and exclusively to the

elimination of the travel bureau operator whether his business is conducted lawfully or not. To achieve that end said order sets up an arbitrary, unreasonable, and capricious classification as between casual drivers. Thus, a casual driver who himself procures his passengers to share expense, or has them procured for him by any person who is not engaged in the business or occupation of procuring passengers for share expense casual drivers, and to whom no compensation is paid, is still exempt from the requirements of the Motor Carrier Act. But should that same casual driver obtain the same information from a person engaged in the business of furnishing such information as a regular business, *i.e.*, the travel bureau operator, or from a person not engaged in such business but who receives a compensation for said information, he is not exempt from the requirements of the Motor Carrier Act. In each instance the transportation is of a casual, occasional and reciprocal nature. In each instance the services of a third person may be used. But the casual driver who pays the third person for the information received or obtains it from a third person who is in the business of furnishing such information either gratuitously or for compensation, becomes, under MC 35, a common or contract carrier and must comply with all of the requirements under the Motor Carrier Act applicable to such carrier.

This entails, among other things, the following: Filing a verified petition in the Interstate Commerce Commission; attending a hearing thereon; keeping books and records; having his charges regulated if the Commission should see fit to so regulate. This would result in an unwarranted and

arbitrary hardship on such casual driver and would make it well-nigh impossible for him to obtain share expense passengers.

In this connection it has been held that a statute which attempted to change the status of private carrier to that of a common carrier was unconstitutional as a deprivation of due process.

Smith v. Cahoon, 283 U. S. 553, 567, 75 L. Ed. 1264;
Michigan Public Utilities Comm. v. Duke, 266 U. S. 570, 69 L. Ed. 445.

In the last mentioned case, the Supreme Court said at page 450:

> "Moreover, it is beyond the power of the state, by legislative fiat, to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment."

So far as MC 35 was designed to safeguard the public with respect to the use of the highways, the discrimination it makes between the casual driver who is relieved of the necessity of procuring a permit and the casual driver who is required to obtain a permit, is wholly arbitrary and constitutes a violation of the Fifth Amendment.

DISCUSSION OF POINT NO. 5

Since Congress has no authority under the Constitution to delegate its powers, the Interstate Commerce Com-

mission was without authority to promulgate rules and regulations for petitioner's business.

Since Congress has the exclusive power to regulate interstate commerce and since the Congress has exempted the occasional, casual and reciprocal transportation and since the regulations passed upon petitioner by the Interstate Commerce Commission are such that the petitioner cannot obey such regulations and at the same time operate the same and similar business in which he is engaged, then the rules and regulations of the Interstate Commerce Commission is, therefore, impossible of performance.

The facts of this case show that no bonding company or solvent sureties will make the bond imposed by the Act, and, therefore, petitioner cannot comply with its provisions.

Under the facts of this case, there is no necessity to place the term "broker" upon petitioner and the Interstate Commerce Commission has no authority to regulate petitioner's business. Most of the petitioner's business is getting people together who are traveling from one state to another. The Constitution gives Congress the power to regulate interstate commerce; *U. S. Constitution, Art. 1, Sec. 8, Ch. 3,* provides:

> "The Congress shall have power—(Ch. 3) to regulate commerce with foreign nations and among the several states and with the Indian tribes."

Following the authority so delegated to Congress by the states, Congress has passed what is known as the "Motor

Carrier Act," *Sec. 306, Title 49, U. S. C. A.;* this Act forbids petitioner from acting as a transportation agent:

> "Section 306—Except as otherwise provided—no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or operation on any highway—."

Petitioner cannot secure a broker's license by ruling of the Interstate Commerce Commission in *Walter Patrick McDonald, et al., dba Auto Travel Bureau, Broker Application, No. MC-12, 107, July 15, 1939,* wherein the Commission said:

> "If applicants confine their services to arranging for the casual or reciprocal transportation of the passengers by persons not engaged in transportation by motor vehicle as a regular occupation or business within the meaning of Section 203 (b) (9) of the Motor Carrier Act, 1935, such services would not be subject to the Act and the Commission has no alternative but to deny an application for such services."

The Act violates the 5th Amendment to the Constitution of the United States in that it deprives the petitioner of his property without due process of law.

Monongahela Nav. Co. v. U. S., 148 U. S. 312;
U. S. v. Chicago, Milwaukee R. R., 282 U. S. 311;
Tagg Bros. & Moorhead v. U. S., 280 U. S. 420.

Thus in the *Chicago, Milwaukee case, supra,* the court, at page 327, said:

> "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be de-

prived of life, liberty or property without due process of law."

The Interstate Commerce Commission has repeatedly held that it has no jurisdiction whatever over travel bureaus.

MacDonald & Wright, Broker Application No. MC 12, 107, July 15, 1939;

J. Elliott Frank, Broker Application No. MC 15, 860, June 14, 1938.

Regarding the application of *MacDonald & Wright, supra*, the Interstate Commerce Commission in denying the same, said:

> "If applicants confine their services to arranging for the casual or occasional transportation of passengers by persons not engaged in transportation by motor vehicle as a regular occupation or business within the meaning of Section 203 (b) (9) of the Motor Carrier Act, 1935, such services would not be subject to the Act and the Commission has no alternative but to deny an application for such service. However, if applicants should at some future time desire to arrange for the transportation of passengers by persons or carriers other than those falling within the exemption heretofore referred to, it would be necessary to secure a license from the Commission before engaging in such operations."

As stated by the Supreme Court in *Smith v. Texas, 233 U. S. 630, 636, 58 L. Ed. 1128:*

> "In so far as a man is deprived of his right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted

> to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

In this connection it has been held that a statute which attempted to change the status of private carrier to that of a common carrier was unconstitutional as a deprivation of due process.

> *Smith v. Cahoon, 283 U. S. 553, 567, 75 L. Ed. 1264;*
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In the last mentioned case, the Supreme Court said at page 450:

> "Moreover, it is beyond the power of the state, by legislative fiat, to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier; for that would be taking private property for public use without just compensation which no state can do consistently with the due process of law clause of the 14th Amendment."

So far as MC 35 was designed to safeguard the public with respect to the use of the highways, the discrimination it makes between the casual driver who is relieved of the necessity of procuring a permit and the casual driver who is required to obtain a permit, is wholly arbitrary and constitutes a violation of the Fifth Amendment. The Supreme Court of the United States has recognized that a statute may be arbitrary, capricious, and unreasonable in its clas-

sification as to be a violation of the due process clause of the Fifth Amendment.

Heiner v. Donnan, 285 U. S. 312, 76 L. Ed. 772;
Blodgett v. Holden, 275 U. S. 142, 72 L. Ed. 206;
Smith v. Cahoon, 283 U. S. 553, 75 L. Ed. 1264.

As said in *Hartford Steam Boiler Inspection & Insurance Company v. William B. Harrison, Insurance Commissioner, 301 U. S. 459, at 462, 81 L. Ed. 1223 at 1226:*

> "Discriminations are not to be supported by mere fanciful conjecture * * *. They cannot stand as reasonable if they offend the plain standards of common sense.
>
> *"All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of the Senate and House of Representatives." Article 1, Sec. 1, United States Constitution. The Congress is empowered to make "all laws" necessary to carry out its general powers. Article 1, Section 8, Subd. 18.*

It is the contention of this petitioner that the Congress has no power under the Constitution to delegate its powers, and since the removal and changing of Sec. 210 of the Motor Carrier Act was done by the Interstate Commerce Commission and not by Congress itself it, therefore, violates the provision of the Constitution as hereinabove set out.

In the case of *Field v. Clark, 143 U. S. 649,* wherein the delegation of certain powers was given to the President of

the United States and such delegation was properly attacked before the court, the court said:

> "Congress cannot delegate legislative power to the president is a principal universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."
>
> *Panama Refining Co. v. Ryan, 293 U. S. 388;*
>
> *Wayman v. Southard, 23 U. S. (10 Wheat.) 1;*
>
> *Hampton, Jr. v. U. S., 276 U. S. 394.*

In the case last cited, the Supreme Court epitomized the point as follows:

> "There is a distinction between delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law."

In other words, Congress must, in addition to declaring the policy of the law, set up standards of action by which such policy can be carried out.

An examination of Section 203(b)(9) of the Motor Carrier Act of 1935 discloses no standards whatever; it merely is the declaration of an exemption. It has been held that such a section as this must, so far as the delegation of powers is concerned, stand by itself and it may be isolated from the rest of the Act of which it is a part in order to determine whether the standards, if any, set up by it are sufficient.

> *Panama Refining Co. v. Ryan, 293 U. S. 338;*
> *22 California Law Review 437.*

Nor are there any standards set up in Section 203(b)(7a). That subdivision states only that the Commission may eliminate the exemption of casual drivers if it find "from time to time" that the national transportation policy will be furthered.

Are there, then, any standards set up in the national transportation policy which are sufficient to guide the Commission in the exercise of the power granted to it? The national transportation policy (Act Sept. 18, 1940, c. 722, Title 1, Section 1, 54 Stat. 899) is declared to be as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical conditions in transportation and among the several carriers; to encourage the establishement and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to coöperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coördinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

This general statement of policy contains nothing whatever as to what conditions or circumstances must be present before the Commission may remove the exemptions con-

tained in Section 203 (b) (9). It speaks of the desire of Congress to be fair and impartial, to encourage safe and adequate transportation, reasonable charges and fair wages so that a system may be developed adequate to meet the needs of commerce and national defense. Congress has nowhere stated how this was to be done or under what circumstances a casual driver interfered with the needs of commerce and national defense so as to require regulation. On the contrary, it is plain that the standards set up are those of the Interstate Commerce Commission itself for they find no justification in the national transportation policy. As said in *Panama Refining Co. v. Ryan, 293 U. S. 388, at 430*, in a similar situation:

> "As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which transportation is to be allowed or prohibited."

In the case of *Panama Refining Co. v. Ryan, supra*, Congress had delegated to the president the power to exclude from interstate commerce oil which had been produced or withdrawn from storage in violation of state restrictions on production. It was contended that the standards set up to guide the president in the exercise of his power thus conferred, were contained in the first section of the Act entitled: "Declaration of Policy." This "declaration" declared that it was the policy of Congress "to remove obstructions to the free flow of interstate and foreign commerce * * *," "to provide for the general welfare of industry * * *" "to eliminate unfair competitive practices, to promote the full-

est possible utilization of the present productive capacity of industries * * * to improve standards of labor, and otherwise to rehabilitate industry and to conserve national resources."

The Supreme Court said of this "declaration of policy" (p. 417ff):

> "This general outline of policy contains nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited—nothing as to the policy of prohibiting, or not prohibiting, the transaction of production exceeding what the states allow. The general policy declared is to remove the obstructions to the free flow of interstate and foreign commerce * * *. It is manifest that this broad outline is simply an introduction to the Act, leaving the legislative policy as to particular subjects to be declared and defined, it at all, by the subsequent sections.
>
> "It is no answer to insist that deleterious consequence follow the transportation of 'hot oil'—oil exceeding state allowances; the Congress did not prohibit that transportation. The Congress did not undertake to say that the transportation of 'hot oil' was injurious. The Congress did not say that transportation of that oil was 'unfair competition.' The Congress did not declare in what circumstances that transportation should be forbidden, or require that president to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the president was not required to choose. The president was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the president without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as es-

sentially to commit to the president the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy."

DISCUSSION OF POINTS NOS. 6 AND 9

The trial court and the Circuit Court of Appeals erred in permitting into evidence pictures of petitioner's business which were taken after the alleged violation without testimony that the same conditions as reflected by the pictures existed at the time of the alleged violation.

Where evidence of Government depended wholly upon testimony of paid college students who admitted they were not seeking a bona fide transportation and would not have accepted such transportation if available but were seeking evidence upon instructions of the Better Business Bureau, and one witness who constantly contradicted his own testimony, the courts erred in placing any reliance or credence in such testimony.

The courts permitted into evidence pictures of petitioner's place of business, said pictures taken on July 10, 1946, and introduced in evidence for the purpose of showing that the petitioner solicited the business in violation and contrary to Interstate Commerce Act and that said pictures so taken were out of date, not charged in the information, and being months later than the dates made in the charges and counts of information and the court permitting the introduction of these exhibits over the objection of the petitioner and same constitutes a reversible error.

The trial court and Circuit Court of Appeals erred in finding the petitioner guilty of Counts Nos. 1 to 6, inclusive, of the informations for the purported violation of Section 211(a) of said Act, Title 49, Sec. 311(a), of the U. S. Code, for the reason that the only evidence submitted by the Government was students at Southern Methodist University, who contended that they were employed by the Better Business Bureau and solicited by the professor at the university to pretend that they desired transportation to various points of the United States and each witness testified that the service was not given, that had it been offered he would not have accepted, that he did not intend to take such trip, that he was merely playing detective and trying to procure the type of information that the Better Business Bureau was trying to procure to file charges against the petitioner, and same constitutes an entrapment; that the evidence is not conclusive to show a bona fide offer or a bona fide contract or a bona fide solicitation or a bona fide arrangement of the kind and character so as to warrant that the courts find this petitioner did arrange for and procure the transportation for the evidence is uncontradicted that the transportation was not arranged and, therefore, said courts erred in finding this petitioner guilty.

Therefore, in reference to the questions of law covering Points Nos. 6 and 9, your petitioner would show that it is fundamental law that evidence of this sort is not admissible, that no credence or reliance can be placed upon it, that to permit pictures taken on July 10, 1946, to be placed in evidence to reflect the conditions which existed in March of 1946, is not admissible and, especially, where there is

no corroborating testimony that the same conditions prevailed in March as in July when the pictures were taken. As to evidence concerning the pictures, the statement of facts speaks for itself.

DISCUSSION OF POINT NO. 7

Where stipulation of facts were agreed upon between the attorney for the petitioner and the attorney for the Government to the effect that even if petitioner possessed a broker's license that petitioner still could not engage in the same or similar business that he was operating but would be compelled to arrange transportation for licensed motor carriers and not for casual, occasional and reciprocal travelers, such requirement is unconstitutional, unreasonable and is an attempt to regulate petitioner out of a lawful business.

The Government, by stipulation, admitted that if the petitioner made application to the Interstate Commerce Commission for the procurement of a broker's license, and had he received such license that he still would not have been entitled to operate the same or similar business which he was now operating and that he could only arrange transportation for licensed common carriers whereas the petitioner was selling information to occasional, casual and reciprocal travelers.

In view of the stipulations agreed upon between the attorney for the Government and the attorney for the petitioner, the trial court and Circuit Court of Appeals erred in holding against the petitioner for the reason that the

petitioner had not violated any law. The following is the stipulation agreed to by the attorneys for the Government and the attorney for the petitioner:

> "Should Mr. Garland have made application to the Interstate Commerce Commission, and presuming that he would have received a license, that such license, if he had received one, as a broker, would not have entitled him to operate the same or similar business that he is now operating, in that the only transportation that he could arrange for as a broker, would be with a licensed common carrier, and that is so defined by statute, and we have stipulated that as an agreement between the parties as to the facts. Is that correct?
>
> "MR. CANTRELL: That is correct."

In view of the above stipulation your petitioner respectfully says that the rules and regulations of the Interstate Commerce Commission or the United States relative to the brokers cannot apply as against this petitioner for the reason that if petitioner had the broker's license complained of by the Government, this license could not regulate or authorize the operation of the kind and character of business that petitioner is now engaged in and that it is an attempt by regulation to force the petitioner to change his character of business. The attorneys for the Government have admitted that even if petitioner had the license that the business which the petitioner engages in would not be covered by such regulation under the broker's license and in this respect petitioner says that the rules and regulations relative to the broker's license does not apply to this petitioner. That to require the petitioner to have such a license is unreasonable, unnecessary and that any law as unreasonable as the rules and regulations of the broker's license rule is

utterly void in its inception. The question is, does the procurement of the purported broker's license actually regulate the business that the petitioner is engaged in? To the contrary, it forces petitioner to depart from the type of business which he is engaged in and compels him to become an agent or employee of a licensed bus line or railroad. Was that the purpose of the regulation, to put the man out of business or to regulate his business? The broker's rule, on its face, is a regulation to regulate the petitioner out of business. The authorities cited to this court in the motion for instructed verdict and the law set forth herein clearly legalizes the operation of petitioner's business and as far as the laws of Texas are concerned, the travel bureau and the broker engaged in such business is a lawful enterprise.

The evidence was uncontradicted that even if the petitioner had made application to the Interstate Commerce Commission for a broker's license, and even if such broker's license were granted, that the license provided for by the Interstate Commerce Commission is not one which will permit petitioner to engage in the same kind and character of business in which he is now engaged, nor would it permit him to engage in interstate business doing the same business acting as a broker between persons who are engaged in casual, occasional and reciprocal transportation.

In the case of *Sam Lee Garland v. Office of Price Administration*, heard before the Honorable Wm. H. Atwell, United States District Judge for the Northern District of

Texas, Dallas Division, in passing upon the question of the legality or illegality of travel bureaus in Texas, stated:

> "It was certainly wrong of Holt and his investigators, to declare that travel bureaus were illegal; that they were going to put them out of business. Neither Holt nor Brown, nor the investigators has any such power. Nor are travel bureaus illegal in Texas. Power is voracious. It has an increasing appetite. It grows upon its own exercise. There is nothing in the national rationing regulation, or statute, which authorized the 'putting out of business' the travel bureau. The highest court in Texas, which deals with such matters, has declared upon a number of occasions that the business is legitimate and any attempt to eliminate it by regulation is unconstitutional. Ex Parte Martin, 187 Tex. Cr. R. 25, 74 S. W. (2d) 1017; Ex Parte Talkington, 132 Tex. Cr. R. 361, 104 S. W. (2d) 495. A business may not be declared contraband which merely brings parties together who on their own responsibility, and with no limitation upon their investigation and inquiry, may eventually enter into an agreement to make a trip together. So the debate is over on that question. The travel bureau is legal in Texas. Garland v. Brown, Adm'r of O. P. A., et al., 52 Fed. Sup. 401."

DISCUSSION OF POINT NO. 8

Where evidence is undisputed, and a reasonable inference can be drawn that the type of bond required of petitioner was impossible of procurement, the trial court and the Circuit Court of Appeals erred in holding petitioner guilty for failure to file such bond with the Interstate Commerce Commission.

The trial court and the Circuit Court of Appeals erred in finding the petitioner guilty of Count No. 7 because the evidence was conclusive that the bond required under

the Act was impossible of procurement and was a type of bond which insurance companies would not write for the reason that petitioner does not sell, control, or operate the motor vehicles and is wholly a seller of information and having no control over the destiny of said motor vehicle and having no interest in the motor vehicle is not coverable by insurance or bond as required by Section 204(a)(4) and Section 211(a)(c), Interstate Commerce Act and the evidence is uncontradicted that such bond is not available, that it is impossible of procurement and, therefore, the courts erred in finding the petitioner guilty of violating a law because of impossibility of performance.

The business of petitioner is a private one; he sells only information whereby a private citizen may make a contract or agreement with another; he has nothing to do with the terms of such contract. When a contract is made between the parties whom petitioner has introduced by means of his information bureau, he is paid and his negotiations are at an end.

There is no more reason for petitioner to post a bond than for a grocer, a tailor, or a wood chopper to post such bond before he enters into a private contract of employment.

Petitioner's business is not subject to regulation under the police power as was held by Judge Lattimore in *Ex Parte Martin under Syl. 5* thereof:

> "Without attempting a definition of police power, further than to quote from our Supreme Court in Spann v. City of Dallas, 111 Texas 350, 235 S. W. 513, 515, 19 A. L. R. 1387, wherein it is said: 'The police

power is a grant of authority from the people to their government agents for the protection of the health, the safety, the comfort and the welfare of the public,' we observe that, as far as we can tell from the record before us, this defendant was engaged in the useful and lawful occupation of selling information to private citizens, the conduct of which business was neither in fact or threat an infringement or trespass upon the health, safety, comfort, or welfare of the public. He drove no cars on the public roads or bridges as a business. He made no contracts controlling the share-expense trips of his customers. He sold information by means of which the purchaser thereof was related to the seller only so far as pertained to the route expected to be taken by each or both. He gave no guarantee as to the good or bad character of the parties thus put in touch with each other, or quality of their vehicles."

Also, in the case of *Ex Parte Talkington, 104 S. W. (2d) 495*, we find that the facts exhibited there are the same facts as are presented here by the petitioner, and quoting from Judge Lattimore's opinion, in the first paragraph of page 496 thereof, he says:

"The statement of facts herein shows that appellant conducted what is generally known as a travel bureau in Fort Worth, Texas, at the Metropolitan Hotel in said city. Here he kept two registers. In one, persons registered their names and addresses who desired to share the expense of travel with some person owning an automobile and going to the point to which the registrant desired to go. In the other, persons registered as going by automobile to points within and without the State of Texas, who would like to have some person accompany them and pay part of the necessary expenses of the trip. Further, it is shown by the record that if appellant brought two persons together whose names appeared on the respective registers mentioned, and these parties agreed with each other upon

the division of the expenses of the trip under consideration, the party who rode in the car of the other paid to appellant one dollar as compensation for his said service.

"Appellant collected nothing from the car owner, had nothing to do with the share-expense agreement, got no part of the cost of same, made no representations, and gave no guarantees in regard to cars, or the conduct of the trip, acting solely as an information bureau or person who collected from one of said parties the fee above set out in case his information brought such parties together, and they made a satisfactory agreement between themselves."

The Statement of Facts in this, the petitioner's case, show:

"That appellant operates a travel bureau in Dallas, Texas. That he keeps two registers. In one of these is registered the names and addresses of persons who desire to share the expense of travel with some person owning an automobile and going to a point which the registrant desires to go. In the other register are persons' names who are going by automobile to points within and without the State of Texas, and who would like to have someone accompany them and share a part of the necessary expenses. Appellant's business is that of bringing the two persons together, and if these parties agree with each other upon the division of the expenses of the trip under consideration, the appellant is paid a flat fee as his compensation for his services in introducing the parties to each other. Appellant collects nothing from the car owner and has nothing to do with the share-expense agreement; he makes no representations and gives no guarantees in regard to the course or the conduct of the trip but allows the two parties to make their own contract and to agree upon such terms as they may desire. In the event the parties do not agree upon a consideration or the route that they are to take, or in other words, if they do not travel

with each other, appellant is paid nothing for his services in introducing the parties, but if they do make an agreement between themselves, then appellant is paid a small fee for his services."

We respectfully submit that the facts in the petitioner's case and the facts in *Ex Parte Talkington* are the same and that Judge Lattimore found that there was no difference in the facts in the *Talkington case* and those exhibited in *Ex Parte Martin*. Judge Lattimore, in the *Talkington case*, on *page 496, fourth paragraph*, said:

> "This court finds no substantial difference in the facts here exhibited and those brought before us in Ex Parte Martin, 127 Tex. Cr. R. 25; 74 S. W. (2d) 1017."

Now with the facts of the "*Martin case*," and the facts of the "*Talkington case*," and the facts as exhibited here by the petitioner, we quote again from Judge Lattimore in his opinion in *Ex Parte Talkington, 104 S. W. (2d) 498, third paragraph* thereof:

> "Bearing in mind what we have above set out from the statement of facts showing the business of appellant to be confined to selling information, and that he does not sell or negotiate transportation, nor does he own nor operate any motor vehicle over any highway in this state or elsewhere, and does not dictate or suggest the terms or conditions upon which the purchasers from him of information shall contract with each other, or whether they go by dirt road or paved, or what route they take, this law seems clearly in violation of the Fourteenth Amendment to our Federal Constitution, and of Section 19 of our Bill of Rights, in that it prohibits this man or any other engaging in a

like occupation, upon the same terms and conditions, (1) because of requirements unreasonable, (2) impossible of performance, without fair application, and prohibitive, and surrounds his attempt to engage in this business with conditions precedent and concomitant such as reveal themselves to a casual reader of those parts of the statute which we have above quoted as being of the kind and character we have just stated."

The late Judge Lattimore, in his opinions in the *"Martin case"* and the *"Talkington case,"* was not without a parallel opinion although few cases are cited by the learned judge in said opinions. We find that comparative decisions have been made in both our Courts of Civil Appeals and in the Supreme Court.

Since the court held in *Ex Parte Martin, supra,* that the appellant's business was not a public one and not subject to the police powers, the Interstate Commerce Commission has no right to interfere with appellant's business.

The Interstate Commerce Commission rules provide that petitioner shall furnish bond with solvent sureties, conditioned that the applicant will faithfully perform all the duties and undertakings of a transportation agent.

The very fact that this law seeks to put petitioner in the interstate commerce and attempts to make him the agent of the "motor carrier" together with Section 14 of said Act setting out the purpose of the Act.

How could any bonding company make such bond under such provisions?

It may be presumed that most any person who takes a stranger into his car for the purpose of sharing expenses is insolvent and should the passenger be injured or lose his baggage or have a misunderstanding with the driver or the owner of the car, the car owner, being insolvent, the next person to look to is the transportation agent, and lawsuits of every nature would follow in any city in the United States. The nuisance claims would put petitioner out of business even though in law petitioner would not be liable.

Judge Lattimore, in *Ex Parte Talkington, supra,* has said:

> "It would be foolish to expect any solvent citizen, corporation, or insurance company to bond a man whose sole connection and duty is finished, under the facts before us, when by means of his information bureau he brings together a man who wants to go with some other on a given trip and another who has a vehicle in which he proposes to make such trip, such bond or policy being (according to the statute) to protect 'any person or persons who shall suffer loss or damage by reason of the failure of any person or motor carrier, through whom transportation may be arranged or over which tickets may be sold by the applicant,' meaning thereby the person who had brought the parties together, who, under the facts of this case, sold no tickets, arranged no transportation, and was in no legal sense the representative of the individual furnishing transportation, who is here called 'motor carrier.'
>
> "Any respectable bonding company, solvent bondsman, or insurance company applied to to make such bond, would presumably ask the information agent: 'How can we afford to bond you when you do not own the vehicle and are not going on the trip, and have no

connection with the matter save to make this contact?"

Judge Lattimore further said:

> "This law seems clearly in violation of the Fourteenth Amendment to our Federal Constitution, and of Section 19 of our own Bill of Rights, in that it prohibits this man or any other from engaging in a like occupation, upon the same terms and conditions, because of requirements unreasonable, impossible of performance, without fair application, and prohibitive, and surrounds his attempts to engage in this business with conditions precedent and concomitant such as reveal themselves to a casual reader of these parts or of the statute which we have above quoted as being of the kind and character we have just stated."

We respectfully submit, therefore, that this law is "impossible of performance" and should be held unconstitutional.

CONCLUSION

In summarizing the various points of error raised in this brief, as well as the evidence contained in the transcript, and the laws cited to this court, your petitioner wishes to remind this court that if the rules and regulations promulgated by the Interstate Commerce Commission were possible of performance this petitioner would be the first to procure a license. But what good is a license which forbids you to engage in the business that you are pursuing, and what good is an application for a license even if the license did permit the continued operations of the busi-

ness, if the requirements such as involved in this case for the making of a bond could not be complied with? The court can readily see that petitioner has no alternative; to submit to the license simply means that petitioner can no longer engage in his business. The railroads and bus lines, as this court will consider, have their own means for handling transportation, but this petitioner does not sell transportation, but merely serves in the capacity of selling information.

Your petitioner would call this court's attention to the discrimination of the Act for respondent would tell the court that the petitioner is selling transportation and should be licensed, but the respondent does not tell the court that the same people who make inquiry in the petitioner's place of business are the same people who may from time to time insert ads in the newspapers, advertising for someone to ride with them in their automobile and share the expense of travel, or advertising for persons who have cars who are going to the same location and with whom they would like to ride and share the expense of such travel. There is nothing in the Act that regulates the newspapers of this country to refrain from advertising and, in fact, selling information to the public. In the case of the newspaper, they receive their revenue both ways, both from the advertiser who desires to ride, and from the person who buys the newspaper to see if there is someone who desires to share expenses. Is not petitioner's business the same as the newspapers'? This record reflects that petitioner keeps two sets of registers; one in which people register who are going to take a trip and desire to have someone travel with

them and share the expense, and the other, in which are those who desire to travel with someone and share the expense. No rule or regulation can be called fair, equitable or reasonable when it, in fact, forces a man out of a lawful occupation.

There is no question, and the record so reflects, that the trial judge went beyond the evidence in his opinion to reach conclusions that people are abandoned on the highway, or that people are too stingy to pay railroad prices or bus line prices for traveling, or that people who travel by the share expense plan might be a robber, hijacker or crook, or that he might be addicted to drinking. These sorts of conclusions are the same type that the bus lines or railroads used in trying to remove the exemption of the casual, occasional or reciprocal travel. Was it because the public was crying for help and asked the Interstate Commerce Commission to regulate the casual, occasional or reciprocal travel, or was it the bus lines and railroads who yelled for help because they were seeking to increase their revenues, enlarge their profits, and deprive the average citizen of his right to take his neighbor, friend or acquaintance on a trip with a share-expense plan between themselves? It would appear to petitioner that this court would have as much right in indulging in presumptions as the trial court and the Circuit Court of Appeals did and the court can very well realize that here are travel brokers, selling information to the public, have leases on their locations, personnel, expense of advertising in phone books and directories and newspapers, and are a going lawful business. To impose the rules and regulations of the Interstate Commerce

Commission upon a lawful business of this character, would mean that petitioners are deprived of their property without due process of law; that their obligations under leases, contracts, advertising, employment, personnel, bookkeepers, contracts with newspapers, telephone companies; all of these obligations would accrue to the damage of the petitioner without any right of the petitioner to continue to engage in the lawful occupation which he had pursued.

The court will consider that regardless of the arguments which are pursued in this brief, and regardless of what the opinions of the other court might be in regard to the various points in this brief, that if this court finds that if the rules and regulations do not carry out the purpose for which intended, or are unreasonable, that the enforcement of such rules is void. Therefore, your petitioner says to this court that even though the Government is the respondent and even though this constitutes a criminal action, and even though the trial court and the Circuit Court of Appeals indicated that it was a close question and even though this court may not be familiar with the actual operations of a travel service, that this business has been held lawful in the State of Texas, by our highest court, is looked upon as a lawful enterprise, it renders a service for the people for which it is maintained, it has been a boon to people who desire the companionship of others and with the opportunity to share the expense of travel. It is almost the last of all contractual rights which a citizen has that has not been interfered with by some sort of regulations and above all, your petitioner wishes to emphasize that respondent will urge that the petitioner could still engage in

the same business provided the casual, occasional and reciprocal traveler procures from the Interstate Commerce Commission a common carrier permit and in this instance your petitioner wishes to remind the court that if Mr. John Q. Citizen is desirous of leaving tomorrow for Los Angeles, and wishes to have someone ride with him for companionship and for the share of expense, that by the time Mr. John Q. Citizen makes known to the Interstate Commerce Commission, at its local office in Fort Worth, Texas, of his desire and fills in the proper forms and applications, which is then submitted to the Interstate Commerce Commission in Washington, D. C., who, in turn, sends out notices to all contract carriers in the United States, listing bus lines, railroads and other licensed carriers, and by the time all other interested parties intervene, and whenever the Interstate Commerce Commission sets a hearing for a day certain and by the time briefs are submitted and the evidence is heard and conclusions are reached, and appeal is taken, Mr. John Q. Citizen has traded his car off three or four times, has made four or five trips to California, has, probably, a son old enough to drive with him, and the entire matter then becomes moot. Meanwhile, Mr. John Q. Citizen is deprived of his constitutional rights of seeking the companionship of a fellow traveler, he is deprived of entering into a contract to share the expense of his travel, he is compelled to hire a lawyer to make an application, to expend money at a hearing before the Interstate Commerce Commission at Washington, D. C., and if the matter is appealed, to incur additional expenses, to all of which would be sufficient for Mr. John Q.

Public to have chartered a plane for himself and give free transportation to an additional forty passengers. If this argument seems to be facetious, it is only because petitioner is acquainted with the underlying motives of the bus lines and railroads. That even though our Government is a party to this action, that, in truth and in fact, it does no more than speak for and act on behalf of the bus lines and railroads in America.

The language in the opinions of *Ex Parte Martin* and *Ex Parte Talkington*, most ably and with good common sense, describe the exact situation as prevails in this case. It is true that this court is not responsible for the acts of the Interstate Commerce Commission. It is true that this court cannot, too, presume what was in the minds of those who attempted without authority to create regulations which were not within their province, but this court can and must for the sake of private citizens, determine whether or not large bus lines and railroads can so monopolize the transportation question that it would soon permit them to prevent the average citizen, who drives his own automobile upon the highways of this state and other states, from doing so, and force him to leave his car at home in the safety, comfort and health of the public generally, and compel him to use bus lines and railroads, because if the private citizen who drives his car upon the highway can be, under the theory of the Interstate Commerce Commission, dangerous, irresponsible, financially insolvent, and a danger to the safety, comfort and health of the public generally. Is there no limitation? Or, is not the attempt to

regulate this private business a step toward monopoly of transportation?

Your petitioner cannot help but repeat to this court the folly in the contentions of the Government, for the Transcript before this court, on pages 129-130, is a stipulation of fact between the attorney for the Government and the attorney for the petitioner and the stipulation is uncontradicted in that there is an admission by the Government that even if petitioner had procured a license from the Interstate Commerce Commission that petitioner would not and could not engage in the same or similar business except that the petitioner would have to represent, as a broker, bus lines and railroads, and for this reason, your petitioner emphasizes to this court, that presuming he was licensed, and presuming he could make the bond, and presuming that he had met all the unreasonable requirements promulgated by the Interstate Commerce Commission, he still could not sell information as he had done in the past. To this petitioner, this strikes a chord of inconsistent frivolity to say a man must be licensed to what he is doing and after he procures a license, he cannot do it, doesn't make sense and doesn't have any similarity to good judgment.

PRAYER

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the judgment herein of the said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as to this court may seem proper.

Respectfully submitted,

HENRY KLEPAK,
Dallas, Texas,
Counsel for Petitioner.

I hereby certify that I have delivered to Honorable William Cantrell, attorney for respondent, whose office is in Dallas, Texas, a copy of this Petition for Writ of Certiorari.

HENRY KLEPAK,
Counsel for Petitioner.

UNITED STATES OF AMERICA
STATE OF TEXAS
COUNTY OF DALLAS

Sam Lee Garland, being duly sworn, deposes and says:

I am the petitioner in the above entitled action. I have read the foregoing petition and the same is true as I verily believe.

.....

Sam Lee Garland.

Sworn to before me this ..... day of February, 1948.

.....

Notary Public,
Dallas County, Texas.

I hereby certify that I have examined the foregoing Petition for a Writ of Certiorari, and in my opinion such petition is well founded and should be granted by this Honarable Court, and said petition is not presented for purposes of delay.

.....

HENRY KLEPAK,
Counsel for Petitioner.